No. 11710.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

EVERETT H. CALLAN,

Appellant,

vs.

FLOYD COPE and ARTHUR AUSTIN,

Appellees.

APPELLANT'S OPENING BRIEF.

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Jurisdictional Statement.

This is an appeal in Admiralty from a final decree of dismissal entered in the United States District Court for the Southern District of California, Central Division, in an action for damages under the Jones Act (46 U. S. C. A. 688), and for maintenance and cure. Appellant sustained serious injuries October 16, 1944, on the fishing boat, "Atlas," at Newport Beach, California, when it blew up while taking on gasoline.

The pleadings in the District Court were a libel for damages, maintenance and cure [Ap. 3]; answer of respondent Floyd Cope [Ap. 8]; petition to bring in third party [Ap. 15]; and order impleading third party. [Ap. 18.]

A citation was issued and served on respondent Arthur Austin, but the Court tried the case prior to the date upon which this respondent was required to appear. [Ap. 19.]

A trial was had before the United States District Court with the Honorable J. F. T. O'Connor, Judge, presiding. However, when the libelant rested, a motion for a non-suit was made upon behalf of respondent Floyd Cope. The Court granted the Motion and made it applicable to both of the respondents, one of whom had not appeared, and who still has not appeared in this action.

Findings of fact and conclusions of law were served on the office of counsel for libelant on January 17, 1947, but contained no provision therein, nor were approved as to form as required under local rule 7a of the United States District Court for the Southern District of California. Notwithstanding the prohibition contained in local rule 7a, the Court signed both findings of fact and conclusions of law and the final decree of dismissal on January 20, 1947 [Ap. 114, 117], prior to the time the libelant had within which to serve and file his objections to and proposed amendments to the findings of fact and conclusions of law. Libelant served and filed his objections to and proposed amendments to the findings of fact and conclusions of law on January 21, 1947, within the five day period as provided in local rule 7a. [Ap. 108.]

The apostles on appeal, certified by the clerk of the District Court, include the following: petition for order allowing appeal without bond and points and authorities [Ap. 119], order allowing appeal without furnishing bond or costs [Ap. 121], assignment of errors [Ap. 122], notice of appeal [Ap. 128], and praecipe. [Ap. 129.]

The jurisdiction of the District Court over actions, civil and maritime, involving claims for maintenance and cure and damages, arises from Article III, Sections 1 and 2 of the United States Constitution, which provides that the judicial power of the United States shall be vested in the Supreme Court and such inferior courts as Congress may establish, and that such power shall extend to all civil cause of Admiralty and maritime jurisdiction.

Jurisdiction of civil causes of Admiralty and maritime jurisdiction was vested in the courts of the United States by the Act of Congress of September 24, 1789, Chapter 20, Sections 9, 11; Stat. L. 76, 78; 28 U. S. C. A. Section 371.

Appeals from final decrees in Admiralty are authorized by Section 128a of the judicial code, as amended May 9, 1942, (56 Stat. L. 272, 28 U. S. C. A. Section 225), providing that the Circuit Court of Appeals shall have appellate jurisdiction to review, by appeal, final decisions.

Statement of the Case.

On October 16, 1944, at Newport Beach, California, the appellant was employed as a seaman and fisherman on the Gas Screw "Atlas." [Ap. 40, 41, 42.] At that time, the respondent Cope, having suffered a broken arm earlier that day, had respondent Austin signed on as Master thereof on October 17, 1944, at San Pedro, California. [Ap. 30, 31.] On the night of October 18th, the "Atlas" went out with Callan, Cope and Austin all aboard.

Appellant Callan went aboard the "Atlas" about four (4) o'clock on the afternoon of October 18, 1944. Appellee Austin was already aboard. The lines were cast off by Callan and Austin operated the boat across the channel

to the General Petroleum dock to take on gasoline and bait. [Ap. 45, 47, 48.] Callan was given the gasoline hose by the attendant ashore and proceeded to fill the tanks [Ap. 46]; Austin kept the engines running at all times. [Ap. 48.] Before the second tank was filled, there was an explosion aboard and Callan was seriously injured. As a result of the injuries so sustained, he was hospitalized and a brain operation was performed. Thereafter, there was a long period of disability. Neither the costs of his hospitalization, physicians nor maintenance were paid by either of the appellees.

From the evidence, the District Court concluded that the libelant was not entitled to recover the costs of hospitalization, physicians and maintenance from either of the respondents. The Court further held that the libelant was not entitled to recover damages for the injuries sustained as a result of the explosion and gave a judgment of dismissal as to both repondents.

Assignment of Errors.

The assignment of errors upon which the appellant relies are set forth in the appendix to this brief, and are summarized in the following statement of points involved in this appeal:

a. Is libelant entitled to recover his maintenance and cure for an injury admittedly sustained in the course of his employment as a seaman aboard the Gas Screw "Atlas"?

b. Is libelant entitled to recover damages for injuries sustained by him either through the failure of his employers to furnish him a safe place to work, negligence in the operation of the vessel, or unseaworthiness?

c. Was there a complete demise of the vessel so that respondent Cope did not remain either as the employer or co-employer of the libelant?

d. Did the District Court err in trying this action before it was at issue as to all respondents?

e. Did the District Court err in favorably entertaining a motion of nonsuit?

f. Is the District Court in error in assuming that exceptions are saved to a litigant in Admiralty without his requesting the same?

Outline of Argument.

I. This appeal is a trial *de novo*.

II. Libelant is entitled to recover the cost of his cure and his maintenance for the full period of his disability.

III. Libelant was employed by both appellants Cope and Austin.

IV. Is libelant entitled to recover damages for the injuries sustained by him through the explosion on October 16, 1944?

V. A motion for a nonsuit does not lie in Admiralty and the federal rules of civil procedure in regard to nonsuit are not applicable to an action in Admiralty.

VI. The District Court is in error in assuming that exceptions in an action in Admiralty are saved without being requested.

ARGUMENT.

I.

This Appeal Is a Trial de Novo. No Authority Is Necessary to Establish This Point in the Ninth Circuit.

II.

Libelant Is Entitled to Recover the Cost of His Cure and His Maintenance for the Full Period of His Disability.

It has been well recognized for over a century in this country that the obligation of a shipowner or operator which is owed to a seaman for his maintenance and cure is contractual in its nature, being a part of the contract for wages and a material increment in the compensation for his labor and services.

Hardin v. Gordon, 2 Mason 541, 11 Fed. Cases 480, 481, Case No. 6047 (Cir. Ct., Dist. Mass., 1823),—"the classic passage by Mr. Justice Story," said the late Mr. Chief Justice Stone in—

Calmar SS Corp. v. Taylor, 303 U. S. 525, 527 (1937);

Cortes v. Baltimore Insular Line, 287 U. S. 367, 371 (1932);

Pacific SS Co. v. Peterson, 278 U. S. 130, 135 (1928).

The appellant was immediately hospitalized after his injury, incurring a hospital bill of $165.39; doctors' bills in a substantial sum, not appearing in the portion of the transcript before the Court; and paid for his own maintenance during the period of his disability which was approximately five months. There is no question but that the appellant was employed upon the Gas Screw "Atlas" and that he received injuries while engaged thereon.

III.

Libelant Was Employed by Both Appellants Cope and Austin.

The evidence is without contradiction that the appellant was employed upon the 14th day of October, 1944, and at that time respondent Cope was the owner and the master of the Gas Screw "Atlas." [Ap. 39-42.]

IV.

Is Libelant Entitled to Recover Damages for the Injuries Sustained by Him Through the Explosion on October 16, 1944?

There is no question as to the fact of the explosion aboard the Gas Screw "Atlas" on October 18, 1944. The respondent Austin was in the exclusive possession of the vessel at the specific moment of the explosion. Likewise, he maintained the engines of the "Atlas" in operation, notwithstanding the fact they were loading gasoline. [Ap. 45-49.]

The explosion in the case at bar is an event that does not happen in the use of ordinary care.

The latest expression of the United States Supreme Court on the doctrine of *res ipsa loquitur* is found in the case of *Jesionowski v. Boston & Maine R. R.*, 67 S. Ct. 404 (1947). Appellant did not assume any risk of proceeding with the loading of the gasoline at the time, in view of the fact that he was under orders to do the same. Even though the Court may take the position that the danger was obvious, it is not a defense to this action.

Beadle v. Spencer, 298 U. S. 124, 50 S. Ct. 712; 80 L. Ed. 1082;

Le Jeune v. General Petroleum Corp., 128 Cal. App. 404;

Hanson v. Luckenbach S. S. Co., 65 F. (2d) 457 (C. C. A. 2).

The recent decision of the New York Supreme Court in the case of *Boylan v. Southern Pacific Company,* 1937 A. M. C. 137, the Court held that a seaman does not, under the Jones Act, assume the risk of defective appliances and of an unsafe place to work.

Also, in *U. S. v. Boykin,* 49 F. (2d) 762 (C. C. A., Fla. 1931), the seaman did not assume the risk of an obvious danger when acting under the direct orders of his superior. It is well settled that a seaman does not assume the risk of an unsafe place to work. It is undisputable that the circumstances in the case at bar created an unsafe place to work through the maintenance of running engines at a time when gasoline was being loaded. The respondents had exclusive control of the vessel and the operation of its engines and they could not possibly have discharged the duty that was upon them of showing proper care or supervision of the loading of the gasoline when the accident happened. Proper supervision would have dictated the cutting off of the ship's engines during this operation.

There was no assumption of risk on the part of libelant in working under such conditions, of course. (*Arizona v. Anelich,* 298 U. S. 110 (1938).)

It is reasonably certain that the District Court completely overlooked the factor of reasonable care and super-

vision which would have prevented the happening of this accident.

The Meton, 62 F. (2d) 825 (C. C. A. 5, 1923);
Fauntleroy v. Argonaut S. S. Line, 27 F. (2d) 50 (C. C. A. 4, 1928).

Then too, it may be that the maintenance of the ship's engines in operation while gasoline was being loaded constituted unseaworthiness.

Mahnich v. Southern Steamship Company, 321 U. S. 96, 88 L. Ed. 561;
The Osceola, 189 U. S. 175, 47 L. Ed. 764.

It seems conclusive that the doctrine of *res ipsa loquitur* is applicable and that the respondents negligently failed to supply the appellant with a safe place to work or, their action in the manner in which they permitted the gasoline to be loaded constituted unseaworthiness.

V.

A Motion for a Nonsuit Does Not Lie in Admiralty and the Federal Rules of Civil Procedure in Regard to Nonsuit Is Not Applicable to an Action in Admiralty.

Rule 16 of federal rules of civil procedure has no applicability to the entertainment of a motion for a nonsuit, especially when the case is not at issue as to one of the respondents. No stronger argument can be made than to state that Rule 16 means just what it says. It refers to pretrial procedure.

The inapplicability of this rule is further apparent by reason of the fact that respondent Austin had not yet

filed his answer so that it was impossible to form the issues as to him at the date of this trial.

The record in this case will show that respondent Arthur Austin had to and including the 13th day of January, 1946, within which to answer the libel. [Ap. 19.] The case was forced to trial on January 7, 1947, in spite of objections raised by counsel for libelant and respondent Cope. [Ap. 22, 23.]

The forcing of cases to trial before they are at issue and before depositions can be taken is a practice that should be either condemned or approved by our United States Circuit Court of Appeals.

VI.

The District Court Is in Error in Assuming the Exceptions in an Action in Admiralty Are Saved Without Being Requested.

Have the rules of Admiralty been changed to the extent that it is no longer necessary for a party to request an exception in order to save such exception on appeal? The writer of this brief has been unable to find any case that supports the contention of the trial judge in his statement that, "You have an exception to every ruling of the Court according to the rules of the Court." [Ap. 66], and, "You have an exception without making it." [Ap. 73.]

The writer of this brief has reviewed the rules of the United States District Court of the Southern District of California, and finds no such provision contained there-

in. The point involved is a subject of considerable embarrassment to counsel in the trial of Admiralty cases and should be clarified by this Honorable Court.

Conclusion.

It is respectfully submitted that the judgment of the United States District Court in this case be reversed and that this Honorable Court make its decree upon the issues presented herein.

Respectfully submitted,

LEONARD DIMICELI,

DAVID A. FALL,

Proctors for Appellant.

APPENDIX.

Assignment of Errors.

I.

The District Court erred in finding that "each and all of the allegations of paragraph Second of the Libel are untrue, except, that it is true that an explosion occurred on the vessel "Atlas" on the 18th day of October, 1944, at Newport Beach, California, and that libelant as a result thereof sustained personal injuries."

II.

That the District Court erred in not finding that on or about the 18th day of October, 1944, when the said gas screw "Atlas" was at Newport Beach, California, taking on gasoline, the Master of the said "Atlas" so negligently and carelessly permitted and did maintain the engine of said vessel in operation, so that the same caused the gasoline being taken aboard to explode, forcibly throwing libelant through the cabin of said vessel into the waters of Newport Beach Harbor, inflicting upon him the following injuries: depressed compound fracture of the skull, concussion of the brain, laceration of the scalp, contusions and abrasions of his face and entire body and water in his lungs."

III.

That the District Court erred in finding that at all times during libelant's employment on the vessel "Atlas," that the exclusive possession, command and control of navigation of said vessel was vested in Earl Austin by virtue of an oral bareboat charter thereof made and executed between respondents Floyd Cope and Earl Austin on October 16, 1944.

IV.

That the District Court erred in finding that the term of said bareboat charter began on October 16, 1944, and extended to the end of the mackerel fishing season which season ended in February, 1945.

V.

That the District Court erred in not finding that Floyd Cope and Earl Austin were the employers of the libelant.

VI.

That the District Court erred in not taking specific findings on the nature and extent of libelant's injuries, the medical care and services necessitated thereby, the nature and extent of the libelant's disability, maintenance and cure, and on all other damages sustained by libelant.

VII.

That the District Court erred in finding that it is not true that respondents or either of them were negligent.

VIII.

That the District Court erred in finding that there was not at any time any contractual or other relationship between respondent Floyd Cope and libelant.

IX

That the District Court erred in finding in its paragraph VII of Findings "Except as specifically hereinabove found all of the allegations of the libel are untrue, and all of the allegations of the Answer of Floyd Cope are true."

X.

That the District Court erred in not finding that libelant incurred for his cure for the injuries sustained while employed on the "Atlas," the sum of $785.44 for his cure.

XI.

That the District Court erred in not finding that libelant was entitled to recover from respondents and each of them the sum of $497.00 for his maintenance during his disability the result of his injuries sustained while employed on the "Atlas."

XII.

That the District Court erred in not finding that libelant sustained general damages in the sum of $35,000.00.

XIII.

That the District Court erred in not finding that respondent Arthur Austin was the Master of the vessel "Atlas" from and after the 17th day of October, 1944.

XIV.

That the District Court erred in not finding that it is true that respondent Floyd Cope was, at all times mentioned in the libel, the owner of the vessel "Atlas" and that on the 16th day of October, 1944, the said Floyd Cope was the owner, operator and Master of said vessel, and that at all times on and after the 17th day of October, 1944, during the libelant's employment on the vessel "Atlas," the exclusive possession, command and control and navigation of said vessel was vested in Arthur Austin by virtue of an oral demise and charter thereof, and that said charter became effective on the 17th day of October, 1944, the day upon which respondent Arthur Austin was signed on as Master of said vessel.

XV.

That the District Court erred in not finding that libelant received a depressed comminuted compound fracture of the skull and suffered contusions and abrasions about his

face and body, suffered submersion in an unconscious state necessitating resuscitation, adhesions between the temporal muscle and the dura causing traction of the dura, and that the skull fracture is permanent; and that said injury necessitated expert brain and skull surgery and hospitalization from the 18th day of October, 1944, to the 28th day of October, 1944.

XVI.

That the District Court erred in not finding that libelant was totally disabled from the 18th day of October 1944, to and including the 18th day of April 1945; and that during said time after the 28th day of October 1945 incurred lodging expense in the sum of $47.00 per month and expense for his food in the sum of $2.75 per day.

XVII.

That the District Court erred in making any finding with regard to respondent Arthur Austin as the case was not at issue at the time of the trial as to this respondent.

XVIII.

That the District Court erred in trying the case as between libelant and respondent Arthur Austin, as said respondent Arthur Austin had not appeared in said case at the time of trial and that said case was not at issue as to this respondent at the time of trial, and that said respondent had until January 13, 1947 within which to plead to the libel of this libelant.

XIX.

That the District Court erred in signing the Findings of Fact and Conclusions of Law and the Final Decree on the 20th day of January 1947.

XX.

That the District Court erred in not abiding by Local Rule Seven and Local Admiralty Rule 139 of the Southern District of California of the United States District Court.

XXI.

That the District Court erred in not ruling upon the objections to the Findings of Fact and Conclusions of Law and Final Decree presented to the said District Court on the 21st day of January, 1947.

XXII.

That the District Court erred in entertaining a Motion for a Nonsuit in Admiralty.

XXIII.

That the District Court erred in granting a nonsuit in this matter.

XXIV.

That the District Court erred in not decreeing that libelant was entitled to recover his damages, maintenance and cure from both respondents.